

FEB 23 1994

Nos. 93-517, 93-527, and 93-539

~~RECEIVED IN THE CLERK~~

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL
 VILLAGE SCHOOL DISTRICT, BOARD OF EDUCATION
 OF THE MONROE-WOODBURY CENTRAL SCHOOL
 DISTRICT AND ATTORNEY GENERAL OF THE
 STATE OF NEW YORK,

Petitioners,
 -against-

LOUIS GRUMET AND ALBERT W. HAWK,

Respondents.

**ON WRIT OF CERTIORARI TO THE
 NEW YORK COURT OF APPEALS**

**BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS
 BY THE NATIONAL COALITION FOR PUBLIC EDUCATION
 AND RELIGIOUS LIBERTY AND
 THE NATIONAL EDUCATION ASSOCIATION, ET AL.**

LISA THURAU
 NATIONAL PEARL
 165 E. 56TH STREET
 NEW YORK, NEW YORK 10022
 (212) 750-6461

DAVID B. ISBELL
 T. JEREMY GUNN*
 HANNAH HORSLEY
 COVINGTON & BURLING
 1201 PENNSYLVANIA AVE., N.W.
 P.O. Box 7566
 WASHINGTON, D.C. 20044-7566
 (202) 662-6000
COUNSEL FOR AMICI CURIAE
** COUNSEL OF RECORD*

February 23, 1994

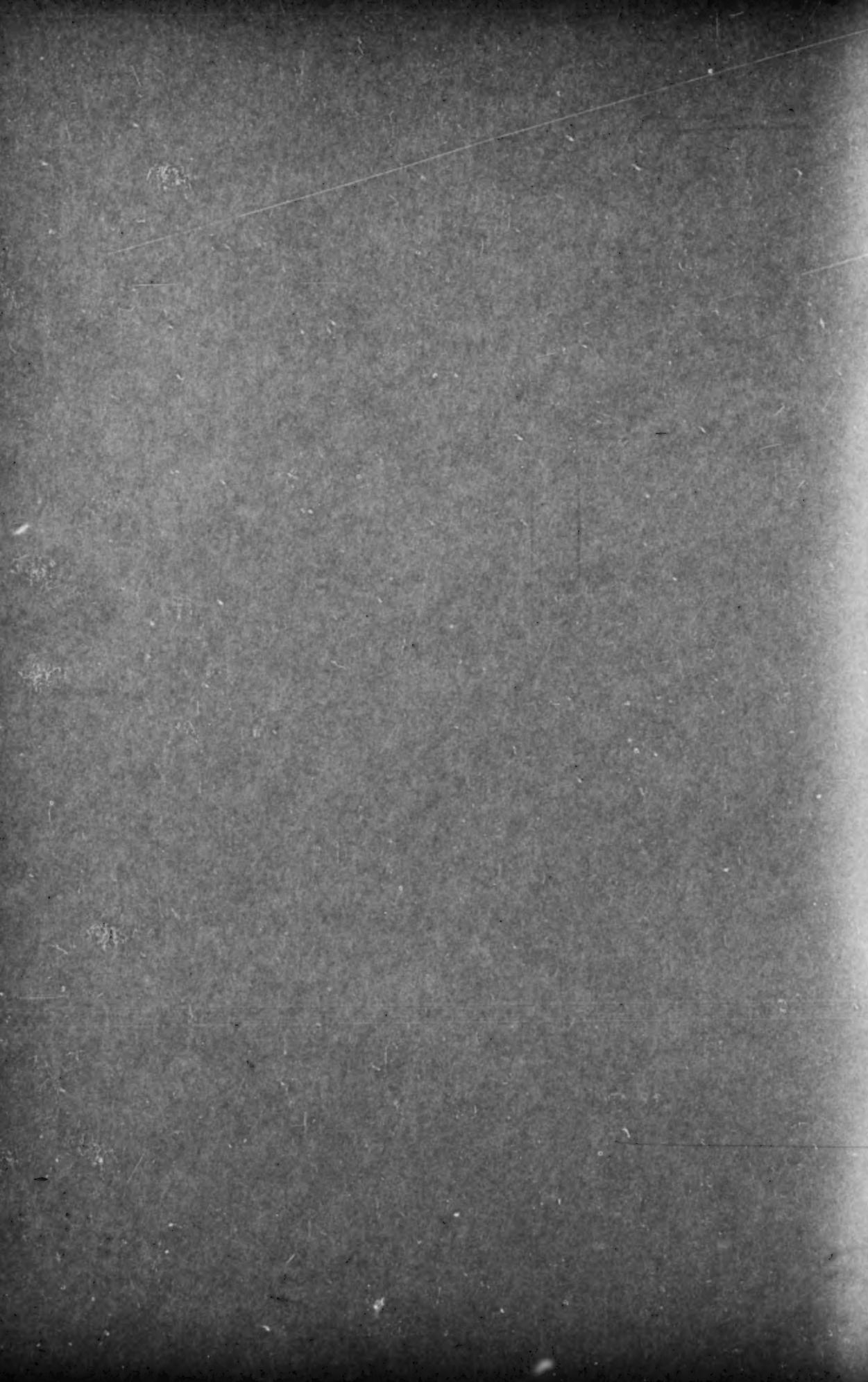


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	v
STATEMENT OF FACTS	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT GRANTS DISCRETIONARY GOVERNMENTAL POWER TO A COMMUNITY THAT FUNCTIONS AS A RELIGIOUS ESTABLISHMENT	5
A. The Village of Kiryas Joel was originally created for the purpose of segregating citizens on the basis of their religious beliefs	6
B. The Village of Kiryas Joel merges religion and government and thus operates as a religious establishment, not as a secular municipality ..	10
1. Religious leaders control the community and municipal elections	10
2. Kiryas Joel imposes religious restrictions on persons seeking residency in the village ..	13

	Page
3. Kiryas Joel merges religion and government in the Municipal Building	15
C. Discretionary governmental power may not be vested in a community that functions as a religious establishment	17
II. CHAPTER 748 WAS ENACTED WITH THE UNCONSTITUTIONAL PURPOSE OF CREATING A SCHOOL DISTRICT TO EDUCATE ONLY HASIDIC CHILDREN	20
A. The purpose of Chapter 748 was not to create a school district with "all the powers and duties of a union free school district" (as it states on its face), but to create a funding mechanism for a single program	21
B. Chapter 748 was designed to create a magnet school to educate hasidic students from the entire county while sending non-hasidic residents out of Kiryas Joel to other schools	22
CONCLUSION	25
APPENDIX	
1989 N.Y. Laws Chapter 748	1a

TABLE OF AUTHORITIES

CASES	Page
<i>Abington v. Schempp</i> , 374 U.S. 203 (1963)	19
<i>Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder</i> , 527 N.E.2d 767, (N.Y. 1988)	8
<i>Bowen v. Kendrick</i> , 487 U.S. 589 (1988)	3, 4
<i>Committee for Pub. Educ. & Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973)	9, 12
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989)	18
<i>Everson v. Board of Educ.</i> , 330 U.S. 1 (1947)	20
<i>Grumet v. New York State Educ. Dep't, 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992)</i>	8
<i>Larkin v. Grendel's Den, Inc.</i> , 459 U.S. 116 (1982)	4, 17, 18
<i>Lee v. Weisman</i> , 112 S. Ct. 2649 (1992)	12
<i>McDaniel v. Paty</i> , 435 U.S. 618 (1978)	25
<i>Parents' Ass'n of P.S. 16 v. Quinones</i> , 803 F.2d 1235 (2d Cir. 1986)	8
<i>Waldman v. United Talmudical Academy</i> , 558 N.Y.S.2d 781 (N.Y. Sup. Ct. 1990)	11, 12
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985)	18

	Page
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	9, 19

CONSTITUTION AND STATUTES

U.S. Constitution amend. I	<i>passim</i>
Fed. R. Evid. 201(b)(1)	16
1989 N.Y. Laws Chapter 748	<i>passim</i>

MISCELLANEOUS

15 <i>Encyclopaedia Judaica</i> (1972)	7
<i>Encyclopaedia Judaica Year Book: Events of 1974/75 (1975/76)</i>	6
H.R. Rep. No. 4156, 50th Cong., 2d Sess. (1989)	10
Jerome R. Mintz, <i>Hasidic People: A Place in the New World</i> (Harvard University Press, 1992)	6, 11, 12, 23
<i>Perennial Dictionary of World Religions</i> 479 (Keith Krim ed., 1989)	15
Israel Rubin, <i>Satmar: An Island in the City</i> (1972)	10

INTEREST OF AMICI CURIAE

Letters of the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the objective of preserving religious freedom and the separation of church and state in public education.

The National Education Association (NEA) is a nationwide labor organization with a current membership of more than two million persons, the vast majority of whom are employed by public school districts, colleges, and universities. NEA has long been a strong supporter of separation of church and state in public education.

The members of National PEARL joining this brief are:

American Association of University Women
American Humanist Association
American Jewish Congress
Americans for Religious Liberty
Anti-Defamation League of B'nai B'rith
Baptist Joint Committee
Council for Democratic and Secular Humanism
Michigan Council About Parochialism
Monroe Citizens for Public Education and Religious
 Liberty (McPEARL)
National Center for Science Education
National Parent Teachers Association
New York Committee for Public Education and
 Religious Liberty (New York PEARL)
Ohio PEARL
Unitarian/Universalist Association

STATEMENT OF FACTS

This case involves the constitutionality of a New York State statute that vests the governmental power to operate a public school district in a community that functions as a religious establishment. The New York Court of Appeals affirmed the lower court decisions and held that the law was unconstitutional on its face.

The Village of Kiryas Joel is a municipality located in Orange County, New York. All of its residents are Satmar Hasidic Jews who live in isolation under rabbinical authority. In the 1970s, the Satmars moved from Brooklyn to the Town of Monroe in Orange County, New York, to establish a religious community. Shortly after moving to Monroe, the Satmars became embroiled in zoning disputes with local authorities. The residents opted to self-incorporate as an independent municipality rather than to comply with existing Monroe law. The Supervisor of the Town of Monroe, who authorized the incorporation, found that the Satmars were seeking segregation from the larger community on the basis of religion.

For the last five years, the village has imposed religious restrictions on persons who wish to move into the community by requiring advance religious approval. The community also imposes a \$10,000 fee, which is used to support the Congregation Yetev Lev, on anyone who builds a new residence in Kiryas Joel. Those who already reside in Kiryas Joel must obey the rabbinical leadership or face expulsion from the Congregation and its affiliated religious schools.

The village's governmental and religious institutions, including the educational institutions, operate under rabbinical authority. Prior to this dispute, Kiryas Joel had never needed nor been interested in having its own public school district. The non-disabled children in Kiryas Joel are educated in private religious schools affiliated with the Congregation. Monroe-Woodbury Central School District initially provided the services

for Kiryas Joel's disabled students in an annex to one of the religious schools. After 1985, Monroe-Woodbury provided the services in its existing public schools, none of which was located in Kiryas Joel. The Satmar parents, however, refused to send their children to public schools outside Kiryas Joel for a number of reasons, including concerns about acculturation and whether the children would be accepted in the Satmar community if they were exposed to the alien culture of the larger community.

The New York State Legislature passed Chapter 748 of the Laws of 1989 for the express purpose of creating a magnet school to provide special education services to disabled hasidic children throughout Orange County. No one intended the school district would be fully operational or expected that any other public schools would be established in Kiryas Joel. Instead, it was expected that, if non-Satmars were ever to live in Kiryas Joel, they would be bused to public schools outside of the Village. To date, the Sha'arei Hemlah school for the disabled is the only public school in the district.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners do not squarely address the most obvious and most important issue in this case: the constitutionality of vesting the power to operate a public school district in a municipality that functions as a religious establishment.

Where, as here, a law is challenged on its face under the Establishment Clause, the "inquiry [begins] with a consideration of the nature of the institutions in which the [challenged] programs operate.'" *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 384 (1985)).^{1/} The institution in which the challenged program

^{1/} This case comes before this Court on a facial challenge to the constitutionality of a New York law granting Kiryas Joel "all the powers and duties of a union free school district." 1989 N.Y. Laws Chapter 748 ("Chapter 748"). The text of Chapter 748 is included in the Appendix to this brief.

Petitioners incorrectly state that the "operation of the Kiryas Joel public school under the current school board has not been challenged in this purely facial attack on Chapter 748." (KJ Br. at 35.) The record reflects, however, that the operations of the Sha'arei Hemlah school were challenged below. *See, e.g.*, (R. at 424-27, 500, 502-04, 511-13.) The statute is being challenged facially not because anyone concedes that Kiryas Joel's Sha'arei Hemlah school for the disabled operates within constitutional parameters, but because: (a) the Complaint was filed before the school became operational; (b) the respondents (plaintiffs below) moved for summary judgment based upon a facial challenge; and (c) discovery is not complete with respect to the operations of the Sha'arei Hemlah school or the school board. The Second Amended Complaint is not limited to a facial challenge of the constitutionality of the statute. *See* Second Amended Complaint, (R. at 311). The complaint alleges that the school will have impermissible effects, (R. at 339), and that the statute violates state education law, (R. at 341-43). Accordingly, if Respondents' facial challenge is not upheld here, this case must be remanded for further proceedings.

operates here is the Village of Kiryas Joel. Unlike any other municipality in the state of New York, Kiryas Joel was created for the express purpose of segregating citizens on the basis of their religious beliefs. Once established, the village institutionalized overt discrimination against those who did not adhere to the sole religious faith, Satmar Hasidism. The explicit segregationist goals have proved successful, for, as Petitioners admit, "Kiryas Joel's residents are all currently Satmar Hasidim . . ." (KJ Br. at 34.) Having created a religious establishment, Kiryas Joel now seeks this Court's approval to exercise the governmental power of operating a public school district.

Never before has this Court permitted discretionary governmental powers to be granted to a community that functions as a religious establishment. In the case most squarely on point, where a statute granted discretionary governmental powers to a religious community, an eight-member majority of this Court struck down the statute and concluded that "delegating a governmental power to religious institutions . . . inescapably implicates the Establishment Clause." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982).

Petitioners seek to divert this Court's attention from Kiryas Joel's unequivocal religious establishment by appealing to the emotionally compelling issue of providing education for the disabled. Despite the fact that the challenged law says *nothing* about a school for the disabled, Petitioners recognize that they are on safer ground arguing for aid to the handicapped than in justifying the "nature of the institutions in which the [challenged] programs operate." *Kendrick*, 487 U.S. at 610.

The Amici respect the Satmars' religious beliefs that lead them to separate themselves from the larger community. The Satmars' beliefs are and should be fully protected by the First Amendment. But the same First Amendment that protects the

Satmars' choice also prohibits them from creating a religious establishment that operates a public school district.

ARGUMENT

I. CHAPTER 748 VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT GRANTS DISCRETIONARY GOVERNMENTAL POWER TO A COMMUNITY THAT FUNCTIONS AS A RELIGIOUS ESTABLISHMENT.

As Petitioners candidly acknowledge, "everyone who lives in Kiryas Joel today is a devoutly Orthodox Jew." (KJ Br. at 16.)^{2/} The "residents of the Village are Satmar Hasidic Jews — devoutly religious people who reside in an insular community where religious ritual is scrupulously followed." (KJ Br. at 3.) But Petitioners suggest that the prevalence of Satmars in Kiryas Joel, and the lack of non-Satmars, simply reflects free choices made by "people who happen to be religious" (KJ Br. at 23.) They further argue that it is "only natural" that elected officials will "mirror the citizens of the community," (KJ Br. at 34), and that there is nothing impermissible in the fact that "religious and secular interests coincide," (KJ Br. at 22).

Petitioners mischaracterize the Satmar community at Kiryas Joel. Not only was the municipality originally established for the purpose of segregating citizens on the basis of their religious beliefs, it has subsequently merged the functions of religion and

^{2/} "KJ Br. at __" refers to Brief for Petitioner Board of Education of the Kiryas Joel Village School District. "MW Br. at __" refers to Brief for Petitioner Board of Education of the Monroe-Woodbury Central School District. "NY Br. at __" refers to Brief for Petitioner Attorney General of the State of New York. "R. at __" refers to the printed record filed in the New York Court of Appeals. "J.A. at __" refers to the Joint Appendix.

government to enforce segregation on the basis of belief and to discriminate against those who do not adhere to the views of the prevailing establishment.

A. The Village of Kiryas Joel was originally created for the purpose of segregating citizens on the basis of their religious beliefs.

The Satmars first moved to the Town of Monroe, New York, in 1974. Jerome R. Mintz, *Hasidic People: A Place in the New World* 206-07 (Harvard University Press, 1992). At that time, Monroe was recognized as a community with broad religious tolerance that had already welcomed several distinctive religious minorities. In describing the Satmars' move to the town, the *Encyclopaedia Judaica Year Book* explained that Monroe "is already a place with some diversity: there is a Jesuit retreat, a Hare Krishna ashram, and a Jehovah's Witness convention center."^{3/}

Within two years of their arrival, however, the Satmars had become entangled in disputes with the local government. Zoning disputes broke out because the Satmars' new multi-family apartment buildings did not conform to the town's single-family zoning requirement. See W.C. Rogers, Decision on Sufficiency of Petition [for Incorporation of Kiryas Joel], Dec. 10, 1976 ("Incorporation Decision"), (J.A. at 8-13);^{4/} see also Mintz, *Hasidic People* 207.

Rather than agreeing to comply with the pre-existing zoning requirements of the town to which they had voluntarily moved,

^{3/} *Encyclopaedia Judaica Year Book: Events of 1974/75* 419 (1975/76).

^{4/} W.C. Rogers was Monroe's Town Supervisor. The Incorporation Decision permitted Kiryas Joel to conduct a referendum and thereby self-incorporate.

the Satmars followed the injunction of their Grand Rebbe, Joel Teitelbaum, who "forbade the hasidim living in his community to cooperate with state institutions . . ." 15 *Encyclopaedia Judaica* 910 (1972).^{5/} Accordingly, the Satmars took advantage of a rarely used provision of New York's village law and petitioned for the self-incorporation of a community to be named in honor of their religious leader, the Grand Rebbe Joel Teitelbaum. Incorporation Decision, (J.A. at 8-9).^{6/} The Satmars thus sought to carve out a village from the middle of the surrounding Town of Monroe.

Supervisor Rogers's Incorporation Decision, which created the new Village of Kiryas Joel, explained that the reason for the incorporation of Kiryas Joel was not consistent with the purpose for which the self-incorporation law had been created. (J.A. at 9-10.)^{7/} New York's village law had been designed for the purpose of helping small communities self-incorporate in order to obtain needed services such as water, sewer, and fire protection. (J.A. at 9.) But, Supervisor Rogers found, those services were already fully available to the residents of the community. (J.A. at 9-10.)

The actual reason for carving out Kiryas Joel, the Incorporation Decision revealed, "lies in the makeup of the

^{5/} Petitioners acknowledge the authority of the *Encyclopedia Judaica*. See (KJ Br. at 14 n.6.)

^{6/} "Kiryas Joel" means "the community of Joel." (J.A. at 8.) Reb Joel Teitelbaum was the Grand Rebbe of the Satmars at the time Kiryas Joel was incorporated. He died in 1982 and was succeeded as Grand Rebbe by his nephew, Moshe Teitelbaum.

^{7/} Even though the petition was not consistent with the purpose of the law, Supervisor Rogers found that the petition was technically sufficient and approved it. (J.A. at 15.)

individuals who will reside within the new village These residents are and will be all of the Satmar Hasidic persuasion." (J.A. at 10.) The reason for the incorporation thus had nothing to do with unavailable services or with a sensible geographical division of the town,^{8/} but was designed instead to segregate citizens on the basis of their religious beliefs and to establish a municipality operated by the Satmars. (J.A. at 10.)

Separation from the larger community on the basis of religion is a deeply ingrained aspect of Satmar religious practice. The trial court below found that the Satmars' "articulated goal is to remain segregated from the rest of society." *Grumet v. New York State Educ. Dep't*, 579 N.Y.S.2d 1004, 1007 (N.Y. Sup. Ct. 1992). The New York Court of Appeals, in a related case, found that the Satmars of Kiryas Joel believe in "separation from the outside community." *Board of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder*, 527 N.E.2d 767, 769, (N.Y. 1988). The Second Circuit, in yet another case involving the Satmars, held that their practices include a "desire to keep their children separate." *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1241 (2d Cir. 1986). The Satmars have resisted, for example, sending their children to schools with other children who also are minorities. "[T]hey are reported as seeing Hispanics as 'different' and 'not a good influence on [the Hasidic] girls,' and as believing that educating Hasidic children in the company of Hispanic children would 'corrupt[] the Hasidic children,'" *id.* (citation omitted).^{9/}

^{8/} Compare Petitioner's argument justifying the constitutionality of the Kiryas Joel school district that merely "sets up a school district that is defined geographically." (KJ Br. at 20) (emphasis in original).

^{9/} Amici are mystified by Petitioners' statements that separatism is not part of the "Satmar faith," (KJ Br. at 4 n.1), and that the basis of their claims arise only from "cultural" motivations, (KJ Br. at 29). Although (continued...)

Thus, from Kiryas Joel's inception, this Court's decisions were ignored: "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796 n.54 (1973) (citing *Lemon v. Kurtzman* 403 U.S. 602, 622 (1971)). The petitioners have identified no other municipality in New York — or anywhere else in the United States for that matter — that, like Kiryas Joel, was created for the express purpose of segregating citizens on the basis of religion.^{10/}

^{2/}(...continued)

Petitioners deny that separatism is a part of the Satmar faith when making their Establishment Clause arguments, they freely switch their position when seeking the benefits of the Free Exercise Clause:

Chapter 748 has, at most, the effect of accommodating the *needs* of a community of devoutly religious people. The statute does no more than ameliorate a *burden that results from the free exercise of religion*. Without Chapter 748, a *community that has chosen to live together to preserve its religious heritage and practices* will be unable to educate its disabled children to live in the modern world.

(KJ Br. at 40) (emphasis added). Thus Petitioners seek to evade Establishment Clause proscriptions by arguing that they have only *cultural* reasons for not attending public schools and for insisting on having their own school district, but then argue that they are "burdened" under the Free Exercise Clause when their separatism is not accommodated by the government. Such an inconsistency not only undercuts the credibility of their assertions, it undermines their free exercise claims as well. See *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) ("social values" and "philosophical and personal" values do "not rest on a religious basis" and thus do "not rise to the demands of the Religion Clauses").

^{10/} Political communities with overtly religious goals invariably trigger Establishment Clause disputes. Whether the issue is the renaming of the town of Antelope, Oregon as "Rajneeshpuram," or admitting Utah as a
(continued...)

B. The Village of Kiryas Joel merges religion and government and thus operates as a religious establishment, not as a secular municipality.

After side-stepping the fact that Kiryas Joel was established to promote religious segregation, Petitioners insist that the demographic dominance of the Satmars is now a result of free choice. Thus in Petitioners' portrayal of an idyllic Kiryas Joel, municipal officials are elected not because the winning candidates are endorsed by a Rebbe and the opposition candidates are excommunicated and have their children expelled from the only schools in the village, but because the elected officials simply "mirror" the religious composition of the village. Petitioners' idyllic Kiryas Joel is not the real Kiryas Joel.

1. Religious leaders control the community and municipal elections. The Satmar community is centered around the Grand Rebbe. Aff. of Israel Rubin ¶ 8, (R. at 492); *see also* Israel Rubin, *Satmar: An Island in the City* (1972), (R. at 428, 433). The Grand Rebbe, who is the leader of the worldwide Satmar community, is the "ultimate decision-maker in all matters of concern to the Satmar community." Rubin Aff. ¶ 9, (R. at 493).

^{10/}(...continued)

state, this country correctly repudiates governmental entities created for ostensibly religious purposes.

[T]he closest and most inseparable relation of church and state exist in Utah. These things ought not to be, and in our opinion no Territory dominated by such principles and conditions should, while they exist, be admitted into the Union, at least until a sufficient number of non-Mormon citizens shall have located in that Territory to make it reasonably certain that the Mormon Church shall not be able to control the political and secular affairs of the new State.

H.R. Rep. No. 4156, 50th Cong., 2d Sess. (Views of the Minority) at 73 (1889).

The current Grand Rebbe appointed his son, Aaron Teitelbaum, to be the Rabbi of Kiryas Joel. Mintz, *Hasidic People* 209. The New York Supreme Court, which previously had occasion to inquire into the operations of Kiryas Joel, found that "Rabbi [Aaron Teitelbaum] controls the educational affairs of the community. . . ." *Waldman v. United Talmudical Academy*, 558 N.Y.S.2d 781, 783 (N.Y. Sup. Ct. 1990). As the person who controls both the congregation and the schools, Rabbi Aaron Teitelbaum is the *de facto* leader of the Kiryas Joel community. "As both *rov* and *rosh yeshivah*, Rabbi Aaron Teitelbaum has *authority over all activities in the Kiryas Joel community.*" Mintz, *Hasidic People* 209-10 (emphasis added).^{11/}

Rabbi Aaron Teitelbaum uses his power not simply on matters of religious faith and practice, but to control the outcome of municipal elections in Kiryas Joel. For example, when Joseph Waldman, a Kiryas Joel resident, ran for public office without first receiving Teitelbaum's approval, Waldman's six children were summarily expelled from the village schools even though it was "undisputed that the children have exemplary school records . . ." *Waldman*, 558 N.Y.S.2d at 782. The New York Supreme Court held hearings on the expulsion of the candidate Waldman's children and found that the expulsion had been arbitrary and in violation of New York law. The court ordered the Rabbi to reinstate the children, but he refused to do so until after he was found in contempt of court and ordered to pay a fine of \$250 per day. *Id.* at 783.^{12/} His father, the Grand Rebbe, similarly exercises political control over the congregation:

^{11/} The "*rov*" is the chief rabbi, the "*rosh yeshivah*" is the ultimate authority in the yeshivah.

^{12/} The background of the Waldman decision is described in Mintz, *Hasidic People* 317-18.

[t]he Rebbe named the gabbai and exercised his power to have his own people in positions elected by the community: the president (a secular post) and the board of directors. 'After the last election the Rebbe didn't like the results and so he nullified them and put in his own people.'^{13/}

When the children of a dissenting candidate for public office are illegally ousted from the village's schools because their father did not receive permission from the religious leader of the community, as the New York Supreme Court found in *Waldman*, religion and the municipality have become too intertwined with each other.^{14/}

^{13/} Mintz, *Hasidic People* 211 (citation omitted). The "gabbai" is the person appointed to correct the reading of the Torah.

The electoral disputes in Kiryas Joel have already proved the accuracy of the warnings made by Justices Harlan and Black:

As Mr. Justice Black's opinion in *Everson v. Board of Education* . . . emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife, 'generated in large part' by competing efforts to gain or maintain the support of government. As Mr. Justice Harlan put it, '[w]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.'

Nyquist, 413 U.S. at 795-96 (citations omitted).

^{14/} This Court recently quoted James Madison's prophetic warning about the undesirable consequences that result when religious establishments obtain political powers: "experience witnesseth that ecclesiastical
(continued...)

2. *Kiryas Joel imposes religious restrictions on persons seeking residency in the village.* Without any citation to the record, Petitioners state baldly that "no one is excluded from the Village on the grounds of race or religion [but] only members of the Satmar community have, thus far, chosen to live in Kiryas Joel." (KJ Br. at 4); *see also* (KJ Br. at 16) (Kiryas Joel is "inhabited entirely by individuals who have voluntarily chosen to live together"), (KJ Br. at 20) ("no one is excluded from the Village on the grounds of race or religion"). When seeking a writ of certiorari, Petitioners also wanted this Court to believe that "[t]here are no restrictive covenants prohibiting alienation of the parcels to non-Satmarer." (MW Pet. Br. at i.)

In fact, Kiryas Joel imposes strict religious restrictions on persons who might wish to move into the community and on builders who might wish to construct housing in the community. Kiryas Joel announced its restrictive housing policy in a proclamation published in the *Kiryas Joel Bulletin* that was subsequently distributed to the greater hasidic community in *Der Yid: Voice of American Orthodox Jewry*. A mere three months before New York enacted Chapter 748, the leaders of Kiryas Joel announced:

(A) *It is forbidden for any contractor or owner of a house, in our village, to sell or rent an apartment in Kiryas Joel to a new resident without receiving permission in advance, in writing, from the Organization allocated for this purpose. This application has to be signed by the Organization.*

¹⁴(...continued)

establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." *Lee v. Weisman*, 112 S. Ct. 2649, 2657 (1992).

(B) Without having received this permission, it will also not be permitted to become a member of our congregation, and the children will not be allowed to attend the community's school (boys and girls).

The application can be obtained at the office of our Congregation

Kiryas Joel Bulletin, Feb.-Mar. 1989, at 30, reprinted in *Der Yid*, Feb. 3, 1989, at 19.^{15/} Thus, contrary to Petitioners' unsupported claims suggesting an absence of religious restrictions in Kiryas Joel, the community's actual policy has been fully disclosed in the village's own *Bulletin* as well as to the greater hasidic community.

Moreover, Kiryas Joel imposes a \$10,000 fee to support the Congregation Yetev Lev on any person who wishes to build a home in Kiryas Joel. In sworn testimony before the Hon. Irving Kramer, Kiryas Joel Mayor Leopold Lefkowitz not only acknowledged that such a fee was imposed, he sought to justify it.

Q. Do you know if there is a law in Kiryas Joel which requires that a builder of apartments must pay \$10,000 to Congregation Yetev Lev?

A. I think so. I will tell you the reason too.

Q. Please.

^{15/} Twelve copies of each publication and their translations have been lodged with the Supreme Court Clerk's Office.

- A. There are many families there, ten children to a family, the average is ten children to a family, and so that they might continue, so that in order that education may be continued, the builder of a house has to contribute \$10,000.

Leopold Lefkowitz Dep., June 24, 1993, at 412-13,
Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp., No. 13224-90, (N.Y. Sup. Ct.).¹⁶

- Q. Can a builder build in Kiryas Joel without paying \$ 10,000 to Yetev Lev?

THE WITNESS: I think that he must pay that \$10,000.

Id. at 423. Thus, not only must would-be residents of the municipality first obtain permission from a special religious committee, but they also must pay an up-front fee of \$10,000 to support the religious congregation.

3. Kiryas Joel merges religion and government in the Municipal Building. Although the purported "secular" appearance of Kiryas Joel's Sha'arei Hemsolah school for the disabled is not relevant for this facial analysis of Chapter 748, Petitioners repeatedly raise the issue despite the fact that their assertions have not been tested by discovery. (KJ Br. at 22-23, 28); (MW Br. at 25); (NY Br. at 18). But in raising this issue, Petitioners acknowledge that the non-sectarian appearance of public buildings is an important factor in determining compliance with the Establishment Clause. Thus they report "the very significant absence of mezuzahs on the doorposts" at the Sha'arei

¹⁶ Twelve copies of the relevant pages of Mayor Lefkowitz's deposition have been lodged with the Supreme Court Clerk's Office.

Hemlah school. (MW Br. at 25.)^{17/} School Superintendent Benardo similarly notes that there are no mezuzahs at the school. Aff. of Steven Benardo ¶ 11, (R. at 738); *see also* (NY Br. at 18) ("no religious symbols" at the school).

But if it is "very significant" that the school has no mezuzahs, it is equally significant that mezuzahs are publicly and fully displayed on both the exterior and interior doors of the Kiryas Joel Municipal Building.^{18/} Indeed the Municipal Building at Kiryas Joel contains not only the "secular" Water Department and Head Start Program, it also contains the offices of the sectarian United Talmudic Academy Torah V'Yirah and the Mid-Hudson School of Judaic Studies. Kiryas Joel's Mayor, Leopold Lefkowitz, no doubt finds it convenient to have the municipal offices and yeshivah offices combined because, as he acknowledged in his deposition, not only is he the Mayor of the village, but he also serves as President of the Congregation Yetev Lev D'Satmar and as President of the United Talmudic Academy Torah V'Yirah. Leopold Lefkowitz Dep., at 445, 448.^{19/}

^{17/} The mezuzah is a "scroll enclosed in a case that is affixed to all the doorposts in a Jewish home in fulfillment of the biblical injunction: 'And you shall write them (the words of God) upon the posts (mezuzot) of your house and on your gates' (Deut. 6:9; 11:20)." *Perennial Dictionary of World Religions* 479 (Keith Krim ed., 1989).

^{18/} The placement of mezuzahs on the doors of the Municipal Building is the equivalent of a predominantly Catholic community placing crosses on all of the doors of a Town Hall.

Under the Federal Rules of Evidence, a court may take judicial notice of facts that are "generally known within the territorial jurisdiction of the trial court . . ." Fed. R. Evid. 201(b)(1). The Municipal Building, which is open to the public, is located at 500 Forest Road in Kiryas Joel.

^{19/} See n.16 *supra*.

When religious affiliation is used as a basis for creating a municipality, it should not be surprising that religion and government would thereafter permeate each other in that municipality. Such is the case at Kiryas Joel, where the institutions, officials, and electoral process all entwine church and state. To the extent that Petitioners believe that there is nothing exceptionable in the fact that Kiryas Joel "happens" to be inhabited by the members of a single religious faith, we invite them in their reply briefs to identify other municipalities in the United States that: (a) were originally created for the purpose of segregating on the basis of religion; (b) require residents to be approved by a religious committee; (c) impose religious fees; (d) permanently place religious symbols on public buildings; and (e) operate public school districts.

C. Discretionary governmental power may not be vested in a community that functions as a religious establishment.

Kiryas Joel thus is not, as Petitioners would have this Court believe, a community with the incidental characteristic of being populated by a Satmar majority. Rather, by any reasonable standard, the community operates as a religious establishment. Indeed, it would take willful blindness to believe that a municipality, which was created in order to segregate on the basis of adherence to the Satmar faith and that actively excludes persons whose religious beliefs and practices are unacceptable, could be anything other than a religious establishment. Because the Establishment Clause forbids municipalities from operating as religious establishments, it *a fortiori* forbids religious communities, like Kiryas Joel, from receiving the additional discretionary governmental powers provided by Chapter 748.

This Court has recognized that discretionary governmental powers may not be delegated to religious communities. An eight-member majority of this Court held that the government

breaches the Establishment Clause when it "vest[s] discretionary governmental powers in religious bodies." *Larkin*, 459 U.S. at 123.^{20/} In deciding that the Establishment Clause was breached by legislation that rather modestly permitted religious institutions to veto the granting of liquor licenses within 500 feet of their churches, the Court held that the "'objective is to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other.'" *Id.* at 126 (quoting *Lemon*, 403 U.S. at 614). The *Larkin* Court stressed that this doctrine is not new, but began with the "Framers [who] did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions." *Larkin*, 459 U.S. at 127.

This Court recently reaffirmed the core principle of *Larkin*: the government "may not delegate a governmental power to a religious institution" *County of Allegheny v. ACLU*, 492 U.S. 573, 590-91 (1989). While dissenting from the Court's judgment, Justices Kennedy, White, and Scalia nevertheless concluded that:

It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. ***Forbidden involvements include . . . delegating government power to religious groups.***

Id. at 660 (Kennedy, J. concurring in the judgment in part and dissenting in part) (internal citations omitted) (emphasis added).

^{20/} The sole dissenter in *Larkin*, then-Justice Rehnquist, nevertheless recognized elsewhere that the Establishment Clause "forbade preference among religious sects or denominations." *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). In granting discretionary governmental powers to Kiryas Joel, the state legislature ratified a single religion's dominance of the community.

If the modest power to veto the granting of liquor licenses in *Larkin* violates the Establishment Clause, then surely the greater power to operate one, five, or no public schools is even more objectionable. In describing the importance of public education, this Court has held that "[p]roviding public schools ranks at the very apex of the function of a State." *Yoder*, 406 U.S. at 213. Because operating a public school district is one of the most important governmental powers, Petitioners are simply wrong to declare that providing "public education is . . . no different" from providing "trash disposal or any other standard municipal service . . ." (KJ Br. at 16.)

Petitioners repeatedly argue that they seek here only a neutral application of the laws and that it would be an injustice to deny the Satmars the right to operate their own school. Petitioners' "neutrality," however, is quite different from the "wholesome neutrality" recognized in this Court's prior decisions:

The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

Abington v. Schempp, 374 U.S. 203, 222 (1963). The question here, of course, is not whether the Satmars are a powerful sect in the United States, but whether they are a powerful sect in the relevant political community and whether they are perpetuating their political power through discriminatory practices. Such is the case of the municipality of Kiryas Joel, which has impermissibly "fus[ed] governmental and religious functions," *id.*, and which has ignored the First Amendment's prohibition

against government's "participat[ion] in the affairs of any religious organizations or groups and *vice versa.*" *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947).

II. CHAPTER 748 WAS ENACTED WITH THE UNCONSTITUTIONAL PURPOSE OF CREATING A SCHOOL DISTRICT TO EDUCATE ONLY HASIDIC CHILDREN.

New York's own Commissioner of Education acknowledges that, unlike any other public school district in the state of New York, Kiryas Joel was established for the purpose of creating a religiously segregated school for the benefit of one religious group. Aff. of Thomas Sobol ¶ 6, (J.A. at 76-77). The legislative history supports this observation by revealing that the school district was created not simply to educate hasidic students within the geographical confines of Kiryas Joel, but to create a magnet school that would educate hasidic students who lived throughout Orange county. It was similarly foreseen that if any non-hasidic students ever lived in Kiryas Joel, they would be bused out of the school district to other public schools.

In their effort to portray Chapter 748 as a statute that is neutral with respect to religion, Petitioners argue that the law merely "sets up a school district that is defined *geographically*," (KJ Br. at 20), and that there is nothing exceptionable in establishing a school district whose "boundaries are coterminous with an existing political subdivision," (NY Br. at 13). They also point out that "the statute on its face makes no reference to religion," (KJ Br. at 20); *see also* (KJ Br. at 38). These

observations are, however, *post hoc* justifications that ignore the explicit purpose for enacting Chapter 748.^{21/}

A. The purpose of Chapter 748 was not to create a school district with "all the powers and duties of a union free school district" (as it states on its face), but to create a funding mechanism for a single program.

Although Chapter 748 provides that: "the Kiryas Joel village school district [] shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law," the legislative history reveals that the proponents of the law did not intend to create a public school district in any meaningful sense of the term, but to establish a single school for a specific religious sect. Indeed, the Trustees of Kiryas Joel urged Governor Cuomo to sign the bill, stating that it would "*create a separate and non-operating school district* within the boundaries of the Village of Kiryas Joel [whose] sole purpose . . . is to provide for the special needs of our handicapped children . . ." Letter from Abraham Wieder to Evan Davis, July 15, 1989, (R. at 694) (emphasis added). Similarly, Monroe-Woodbury Central School District admitted to the Governor's office that: "It is our understanding that the Kiryas Joel school system will, in effect, be *a non-operating school district* except for special education services." Letter from Daniel Alexander to Evan Davis, July 12, 1989, (J.A. at

^{21/} The petitioners repeatedly stress that Chapter 748 is neutral with respect to religion because it is written in geographic and political, rather than religious terms. Of course, it would not be difficult to describe in neutral terms the geographical or political boundaries of the Vatican, Mecca, Qom, the Branch Davidian compound, or Rajneeshpuram, Oregon. The fact that these religious sites can be described in secular geographical or political terms does not, of course, mean that what takes place inside those boundaries is purely secular activity.

21) (emphasis added). Thus it is indisputable that the face of Chapter 748 does not mean what it says because no one ever intended that Kiryas Joel would operate a real public school district.

B. Chapter 748 was designed to create a magnet school to educate hasidic students from the entire county while sending non-hasidic residents out of Kiryas Joel to other schools.

In urging Governor Cuomo to sign Chapter 748, the chief legislative-sponsor of the bill, Assemblyman Joseph R. Lentol, explained that the real purpose "was to provide state funded special education programs *to the Hasidic children of the county.*" Letter from Joseph Lentol to Governor Mario Cuomo, July 7, 1989, (J.A. at 19) (emphasis added). Thus the school district was designed not simply to educate children within Kiryas Joel's geographical boundaries, but to create a school where hasidic students throughout the county could be educated. This is exactly what has occurred.

The New York official responsible for monitoring the state's educational programs for the disabled has admitted that hasidic students from the county are bused out of their own public school districts and into Kiryas Joel.

Currently the East Ramapo School District and the [Kiryas Joel school district] have contracted for 17 Satmar children with handicapping conditions who reside in the East Ramapo School District to attend the [Kiryas Joel school]. Likewise, the Monroe-Woodbury Central School District has also contracted with the [Kiryas Joel school district] for 3 of their Satmar children with handicapping conditions to attend the [Kiryas Joel school].

Aff. of Hannah Flegenheimer (Director of the Division of Program Monitoring, Office for Education of Children with Handicapping Conditions), (J.A. at 89).

Unlike the arguments advanced by Petitioners here, the proponents of Chapter 748 did not argue that the statute, which carved a tiny school district out of the center of a larger school district, made any sense from a geographical perspective. They emphasized instead that the program was specifically designed to aid a particular religious sect. The chief legislative sponsor explained that the separate school needed to be created because "[t]he hasidic jewish community hold [sic] firmly to its religious tenets." Letter from Joseph Lentol to Governor Mario Cuomo, July 7, 1989, (J.A. at 19). Another major legislative proponent similarly argued that a program should be established for the Hasidim because they otherwise would need to "sacrifice their religious traditions in order to receive the services which are available to handicapped students throughout the state." Letter from Sheldon Silver to Governor Mario Cuomo, July 24, 1989, (J.A. at 39).

The Superintendent of Petitioner Monroe-Woodbury Central School District acknowledged that, "[i]n practical terms it means [the Hasidim] will be able to run a public school system for special-education children. There is no intent on the village's part to run a public school system for anything else." Mintz, *Hasidic People* 316 (citation omitted). Others involved in the process similarly acknowledged that the beneficiaries were intended to be a specific religious sect.^{22/} The targeting of a

^{22/} "At the time the [Kiryas Joel school district] was created by act of the Legislature, it was known that the district was being created in a community that consisted exclusively of inhabitants of the same religious sect." Sobol Aff., (J.A. at 76). The New York budget office interpreted the law as providing aid that would support the particular religious practices of the Hasidim. (J.A. at 32.)

specific sect for special treatment is unprecedented in the New York educational system. As New York's own Commissioner of Education has acknowledged: "[s]uch accommodations have never been made for the parents of other handicapped children in the State of New York or to my knowledge anywhere in the country." Sobol Aff., (J.A. at 81-82).

Not only was the program specially designed to provide education for the hasidic sect, it also was anticipated that any non-hasidic students who might in the future reside in Kiryas Joel would be bused out of the district to other schools. This is exactly what Petitioner Monroe-Woodbury Central School District's Superintendent of Schools disclosed to Governor Cuomo in urging the governor to sign the bill. "If a non-Hasidic child requiring regular education moved into the Kiryas Joel school district's geographic boundaries (and this is virtually impossible) *the child would be tuitioned to Monroe-Woodbury or another district.*" Letter from Daniel Alexander to Evan Davis, July 12, 1989, (J.A. at 22) (emphasis added). Thus, after recognizing the virtual impossibility of Kiryas Joel's boundaries being opened to non-Satmars, Monroe-Woodbury candidly acknowledged that *even if* such students somehow managed to enter the community, they would be sent out of the village for schooling in another district.

Thus it is inescapable: the Kiryas Joel school district was established to educate solely hasidic children, regardless of whether they lived inside or outside Kiryas Joel's boundaries. The purpose of Chapter 748 was not to give governmental powers to a community because of its geographical location or because it was just another political unit within New York. Chapter 748 was designed to give the governmental power to a

specific religious community to operate one school for the sole benefit of the members of that religious community.^{22/}

CONCLUSION

While the Satmars' theocratic municipality in Kiryas Joel favors their beliefs and practices, other municipalities controlled by other faiths, would just as likely discriminate against them. That is why municipalities in the United States should govern within the parameters of the Constitution — not the rules of the Halachic Codes or the Shari'a.

^{22/} All of the Petitioners invoke *McDaniel v. Paty*, 435 U.S. 618 (1978). See (KJ Br. at 17, 34, 35, 40); (NY Br. at 22); (MW Br. at 8, 21). In *McDaniel*, this Court properly invoked the Free Exercise Clause to strike down a provision of the Tennessee Constitution that prohibited clergymen from holding legislative office.

Petitioners cite *McDaniel* as somehow standing for the proposition that elected officials in Kiryas Joel should not be disqualified from office because of their religious beliefs or because they share the religious beliefs of the majority of the community. Framing the issue in such a way begs the question. The issue is not whether an individual may be disqualified due to his or her religious status, but whether the religion itself may be established as the basis of a political community. The problem here is not that individuals are being denied a benefit, but that the Satmars, *because of their separatist beliefs*, have been selectively awarded a benefit unavailable to others. *McDaniel* actually stands for a true neutrality that petitioners reject: "*The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.*" *Id.* at 626 (emphasis added).

For the reasons stated above, Amici respectfully urge this Court to affirm the decisions reached by all three of the New York courts.

Respectfully submitted,

LISA THURAU
National PEARL
165 E. 56th Street
New York, NY 10022
(212) 750-6461

DAVID B. ISBELL
T. JEREMY GUNN*
HANNAH HORSLEY
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-6000
Counsel for Amici Curiae
** Counsel of Record*

February 23, 1994

APPENDIX

§ 1. The territory of the village of Kiryas Joel in the town of Monroe, Orange county, on the date when this act shall take effect, shall be and hereby is constituted a separate school district, and shall be known as the Kiryas Joel village school district and shall have and enjoy all the powers and duties of a union free school district under the provisions of the education law.

§ 2. Such district shall be under the control of a board of education, which shall be composed of from five to nine members elected by the qualified voters of the village of Kiryas Joel, said members to serve for terms not exceeding five years.

§ 3. This act shall take effect on the first day of July next succeeding the date on which it shall have become a law.

Assembly Bill Number 8747, signed into law July 24, 1989 (R. at 90) (emphasis added).